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MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

**October Term, 1972**

**No. 72-521**

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IRISH NORTHERN AID COMMITTEE,
*Petitioner,*

vs.

ATTORNEY GENERAL OF THE UNITED STATES,
*Respondent.*

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## REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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1. With respect to the issue of disclosure of contributors' names, there should be no doubt that the First Amendment right of associational privacy protects the identity of contributors as well as members, *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539; *Bates* v. *City of Little Rock*, 361 U.S. 516.

This right of associational privacy does not, as the Attorney General suggests, depend upon the existence of a demonstrably hostile and violent climate. Inquiries into political affiliation have a general inhibitory effect on freedom of association and as a result, such inquiries must be permitted only when unquestionably necessary. *Pollard* v. *Roberts*, 283 F.Supp. 248 (D. Ark. 1968). Moreover, the recent adoption of the *Gibson* test in *Branzburg* v. *Hayes*, 408 U.S. 665, 700, shows that *Gibson* should be generally applied whenever a careful balance must be drawn between

the government's interest in disclosure and individuals' First Amendment rights.

Applying the *Gibson* test to the facts of this case, the government would be required to demonstrate a substantial relationship between a compelling and overriding governmental purpose and the disclosure of organizational affiliation. However, the government has made no effort to show any justification, either compelling or otherwise, for requiring disclosure and thus inhibiting the exercise of rights protected by the First Amendment.

The primary purpose of the Foreign Agents Registration Act is to assure public disclosure of the identity and activities of those required to register as agents of a foreign principal [Br. Opp. pp. 9-10]. In implementing this objective, Congress did *not* require the disclosure of names of all contributors to registrants.[1] Congress' failure to

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[1] The Act itself does not call for the disclosure of contributors' names, and the Attorney General relies on its own *ipse dixit* for such a requirement. The government quite candidly admits that the justification for compelling disclosure of names derives from the general grant of authority to the Attorney General to require the keeping of records and to permit their inspection.

The Attorney General justifies its own requirement of disclosure of names of contributors by two sections of the Act, but whether the Act could possibly be interpreted to permit the Attorney General's rule of disclosure is a far different question from whether disclosure is mandated in connection with an overriding and compelling governmental purpose.

Moreover, the two sections on which the Attorney General relies are questionable authority for its rule of disclosure. Without any explanation, the Attorney General cites the section of the Foreign Agents Registration Act which defines a foreign agent as one who, *inter alia*, collects contributions for its principal [Br. p. 10]. But this section merely identifies those agents who must register and is irrelevant to the issue at hand.

The Attorney General also relies on Section 2(a)(7) to justify the disclosure requirement [Br. p. 11]. However, the Attorney General admits that this section was enacted to deal with the problem of conduit organizations [Br. p. 11 fn. 14] and all the relevant

so provide can hardly be regarded as an oversight, to be corrected by the Attorney General's rules. Both the 1938 Act as amended and the 1966 Act deal with the general subject of finances and they specifically require elaborate details as to income from foreign principals and disbursements. The 1966 amendment of Section 2(a)(7) only requires the names of contributors who were conduits, *i.e.*, those who were "not themselves foreign principals, [but] who are so related to a foreign principal that their agents were engaged in political activities in the interests of the principal are required to register under the act." Sen. Rept. #143, p. 10, 89th Cong., 1st Sess. (1965) Congress' determination not to require the names of individual contributors demonstrates a concern with First Amendment rights which the Attorney General evidently does not share.

Furthermore, there is no substantial relationship between the articulated purposes of the Act (assuming them to be overriding and compelling) and disclosure of the names of contributors. While disclosure of a foreign agent's identity and activities would permit "the American public [to be] in a better position to make an informed choice whether to support the organization, by membership or contribution" [Br. Opp. p. 13], the disclosure of the names of those who do choose to support the organization is plainly irrelevant. How is the American public better able to make an informed choice whether to support an organization by disclosure of the names of every person who may have contributed $5, $10 or $25 to it?

The Attorney General cannot gloss over this obvious defect and avoid the demonstration of necessity required under the *Gibson* test by urging that the sensitive area of

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[1](Cont'd) committee reports limit its function to meeting that problem: Sen. Rept. #875, p. 10, 88th Cong. 2d Sess. (1964); Sen. Rept. #143, p. 10, 89th Cong. 1st Sess. (1965); House Rept. #1470, p. 8, 89th Cong. 2d Sess. (1966).

foreign relations requires the disclosure of contributors' names. The rule of *Gibson* does away with *a priori* categories to which First Amendment rights must yield. Moreover, even if protection of foreign relations were a primary focus of the Act, the unsupported assertion that our foreign relations requires the disclosure of contributors' names is no excuse for a violation of the Constitution, *United States* v. *Robel*, 389 U.S. 258; *Aptheker* v. *Secretary of State*, 378 U.S. 500.

2. In addition to demanding the names of contributors to the Irish Northern Aid Committee, the Attorney General seeks to inspect *all* the Committee's books and records, pursuant to the Foreign Agents Registration Act itself and the preliminary injunction of the District Court of which the Committee seeks review. Such unlimited inspection would violate the Fourth Amendment protection against unreasonable searches and seizures. Moreover, in view of the pending Texas grand jury investigation, the Committee realistically fears that this is an attempt to obtain evidence for a criminal proceeding.

The Attorney General attempts to minimize the claim that this inspection may be used to gather evidence for a criminal proceeding. However, petitioner's concern cannot be so easily allayed. The Committee should not be required to accept the assurances offered in the district court that the government's "purpose in filing this suit was not to secure evidence for the grand jury" (Br. Opp. pp. 14-15). It is no secret that the prosecuting arm of the government does not always adhere to its representations. See *e.g. Giglio* v. *United States*, 405 U.S. 150; *Santobello* v. *New York*, 404 N.Y. 257.

Nor is the fact that the Texas grand jury could subpoena the New York records of the Committee particularly relevant. The grand jury has thus far chosen not to do so, and we need not speculate as to whether it may and

under what conditions. If such a subpoena were presented, the Committee could raise the First and Fourth Amendments claims presented here. Other defenses might be available as well. For example, the government has elsewhere admitted that one of the counsel for the witnesses in Ft. Worth has been "overheard" as the result of a wiretap, *Gelbard* v. *United States*, 408 U.S. 41.

The Attorney General also suggests that the "required records" doctrine justifies inspection of all petitioner's papers [Br. Opp. p. 15-16]. But even if applicable, that doctrine has never permitted unlimited inspection. Rather, it has approved inspections "carefully limited in time, place and scope." *United States* v. *Biswell*, 406 U.S. 311, 315. See also *Shapiro* v. *United States*, 335 U.S. 1, 32-33.

Respectfully submitted, etc.

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Dated: New York, New York
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